

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA
BECKLEY DIVISION

CIVIL ACTION FILE NO.:

SANDRA M. FLESHMAN-)
MASSEY,)
Plaintiff,)
)
v.)
)
FIRST-CITIZENS BANK & TRUST)
COMPANY & DEBORAH PARKER,)
Defendants.)

NOTICE OF REMOVAL

5:21-cv-00443

TO: Plaintiff, Sandra M. Fleshman-Massey, c/o her attorney of record, Mark A. Atkinson, Atkinson & Polak, P.L.L.C., P.O. Box 549, Charleston, West Virginia 25322.

Defendant First-Citizens Bank & Trust Company (“First Citizens”), hereby removes the action commenced by Plaintiff Sandra M. Fleshman-Massey, from the Circuit Court of Greenbrier County, West Virginia, to the United States District Court for the Southern District of West Virginia. In support thereof, Defendant First Citizens states as follows:

REMOVAL IS TIMELY

1. A civil action was filed by Plaintiff on or about July 1, 2021, and is now pending in the Circuit Court of Greenbrier County, West Virginia, designated as Case No. 13-2021-C-56. Defendant First Citizens was served with the Complaint on July 8, 2021. Pursuant to 28 U.S.C. § 1446(a), copies of all

process, pleadings, and orders from the state court file are attached hereto as Exhibit A. In addition, a copy of the CT Corporation Service of Process Transmittal is attached hereto as Exhibit B. Defendant Deborah Parker has not been served with the Complaint.

2. This Notice of Removal is being filed within thirty days of the receipt, through service, of the Complaint, as required by 28 U.S.C. § 1446(b). Defendant hereby reserves any and all rights to assert the insufficiency of process or insufficiency of service of process as defenses to Plaintiff's Complaint.

3. No further proceedings have been had in the Circuit Court of Greenbrier County, West Virginia, as of the date of the filing of this removal.

DIVERSITY JURISDICTION EXISTS

4. This Court has original jurisdiction over this action pursuant to 28 U.S.C. § 1332 because Plaintiff is a citizen of West Virginia, and Defendant First Citizens is a citizen of North Carolina, and the amount in controversy between the parties exceeds \$75,000. Furthermore, removal is not prevented by the “forum defendant rule” because Defendant Deborah Parker—who is a citizen of West Virginia—has not been “properly joined *and served*.” 28 U.S.C. § 1441(b)(2) (emphasis added)(“A civil action otherwise removable solely on the basis of the jurisdiction under section 1332(a) of this title may not

be removed if any of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.”); *see also Blankenship v. Napolitano*, No. 2:19-CV-00236, 2019 WL 3226909, at *5 (S.D.W. Va. July 17, 2019)(finding that removal was not prevented when a defendant removed before the non-diverse defendant was served); *accord Texas Brine Co. v. American Arbitration Ass'n*, 955 F.3d 482 (5th Cir. 2020); *Encompass Ins. Co. v. Stone Mansion Rest. Inc.*, 902 F.3d 147 (3d Cir. 2018), *reh'g denied* (Sept. 17, 2018); *Gibbons v. Bristol-Myers Squibb Co.*, 919 F.3d 699 (2d Cir. 2019).

REMOVAL IS PROPER

5. Pursuant to 28 U.S.C. §§ 1332, 1441 and 1446, removal of the above-captioned state court action is appropriate.

6. Written notice of the filing of the Notice of Removal is being served upon Plaintiff, and a copy of this Notice of Removal will be filed with the Clerk of the Circuit Court of Greenbrier County, West Virginia as provided by 28 U.S.C. § 1446(d).

7. Venue is proper in this court pursuant to 28 U.S.C. § 1441(a) in that this district and division embrace the place where the action is pending.

8. Defendant reserves the right to amend or supplement this Notice of Removal.

9. Defendant reserves all defenses, and the filing of this Notice of Removal is without waiver of any defense.

WHEREFORE, this Court has jurisdiction pursuant to 28 U.S.C. § 1332 based on the diverse citizenships of the parties and the amount in controversy, and removal pursuant to 28 U.S.C. § 1441 is appropriate.

Respectfully submitted this 5th day of August, 2021.

/s/John Hansberry
John C. Hansberry
W.V. State Bar No.
jhansberry@foxrothschild.com

FOX ROTHSCILD LLP
BNY Mellon Center
500 Grant St., Suite 2500
Pittsburgh, PA 15219
Telephone: (412) 394-5542
Facsimile: (412) 391-6984

Attorney for Defendant
First Citizens Bank & Trust Company

CERTIFICATE OF SERVICE

I hereby certify that on August 5, 2021, I electronically filed the foregoing NOTICE OF REMOVAL with the Clerk of the Court using the CM/ECF system, and I hereby certify that I have mailed the document to the following non CM/ECF participant:

Mark A. Atkinson
Atkinson & Polak, P.L.L.C.
P.O. Box 549,
Charleston, West Virginia 25322

/s/John Hansberry
John C. Hansberry
W.V. State Bar No.
jhansberry@foxrothschild.com

FOX ROTHSCHILD LLP
BNY Mellon Center
500 Grant St., Suite 2500
Pittsburgh, PA 15219
Telephone: (412) 394-5542
Facsimile: (412) 391-6984

Attorney for Defendant
First Citizens Bank & Trust Company